IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.885 OF 2005
IN
SUIT NO.858 OF 2005

Mrs.Sayeeda Shakur Khan and others).. Plaintifs

Versus

Sajid Phaniband and another).. Defendants

ALONG WITH

NOTICE OF MOTION NO.2283 OF 2005
IN
SUIT NO.858 OF 2005

Mrs.Sayeeda Shakur Khan and others).. Plaintifs

Versus

Sajid Phaniband and another).. Defendants

Mr.Sagheer A. Khan with Ms.Hansa Advani for the Plaintiffs.

Mr.Gopal Hegde with Mr.R.M.Vanoo for Defendant No.1.

CORAM: SMT.NISHITA MHATRE, J.

JUDGMENT RESERVED ON : 17TH JULY 2006

JUDGMENT PRONOUNCED ON : 3RD AUGUST 2006

JUDGMENT :

. Notice of Motion No.885 of 2005 has been taken out by the Plaintiffs for a direction to Defendant No.1 to furnish a list of the present and the past tenants in the suit property and to render true and correct

accounts of his dealings in respect of the property from 1st April 2002. A prayer for appointment a Receiver has also been made and an injunction is claimed against Defendant No.1 from disposing off or parting with or alienating, encroaching or creating third party rights in respect of the suit property and from transferring the tenancies in the suit property.

2. Notice of Motion No.2283 of 2005 has been taken out by the Plaintiffs for appointing Court Receiver in respect of the suit property. In the alternative, it is prayed that Defendant No.1 be directed to deposit the excess/surplus rent collected by him in respect of the suit property after deducting the taxes payable to the Mumbai Municipal Corporation with effect from 1st April 2002.

3. By way of ad-interim relief, this Court while hearing Notice of Motion No.885 of 2005, has passed the following operative order :-

> "During the pendency and till the final disposal of the motion, the defendants are restrained by an order of injunction from transferring the property or transferring any of the tenancies of any of the tenants in the suit property or letting out or creating any new tenancies in the suit property without prior permission of this court. The defendants are also directed to file the list of all tenants and rent receivable from each of them. It is clarified that this order does not prevent the defendant no.1 from collecting

the rent from the existing tenants. Motion is made returnable in due course."

4. Notice of Motion No.2283 of 2005 was directed to be heard along with Notice of Motion No.885 of 2005 and no ad-interim relief was granted. These two Motions are, therefore, taken up for final hearing together.

5. One Khatal Moosa Phaniband married Azambi in 1925 under Mahomedan law. A Nikah was performed. The Plaintiffs, Defendant No.2 and the father of Defendant No.1 were their children. Plaintiffs' brother i.e. Defendant No.1's father, pre-deceased Khatal Moosa Phaniband. It appears that Khatal Moosa Phaniband and his wife solemnized their marriage again under the Special Marriage Act, 1954, on 14th September 1970. The Plaintiffs claim a right to the property and estate of their father who they contend died intestate, to the exclusion of Defendant No.1. According to the Plaintiffs, the administration of the estate of the deceased must be effected in accordance with the Mahomedan law. Defendant No.1 would thus not be entitled to any share in the estate as his father had pre-deceased his grand-father. The Plaintiffs contend that Defendant No.1's father having expired before the succession to the estate of Khatal Moosa Phaniband was opened, Defendant No.1 has no right to the estate of his grand-father. The Plaintiffs contend that they and

their sister, Defendant No.2 herein, would, therefore be entitled to an equal share in the property of Khatal Moosa Phaniband i.e. a 1/5th share each.

6. Defendant No.1 contends that his grand-father expired leaving a Will dated 27th December 1978 under which he has been bequeathed all the property except for an amount of Rs.1,001/- to be paid to the Plaintiffs and Defendant No.2, each. Defendant No.1 contends that in view of the marriage of the deceased Khatal Moosa Phaniband and his wife being registered under the Special Marriage Act, 1954, subsequently, the succession to the estate of the deceased Khatal Moosa Phaniband would be governed by the Indian Succession Act, 1925 and not the Muslim Personal Law. According to Defendant No.1, the restriction on a Muslim to bequeath only 2/3rd of his property under Muslim Law is removed in view of the fact that the marriage of the deceased has subsequently been registered under the Special Marriage Act, 1954. Reliance is placed on Section 21 of the Special Marriage Act to support the submission of Defendant No.1.

7. The Plaintiffs, however, point out that the Will cannot be accepted as it is not probated. It is

submitted on behalf of the Plaintiffs that when Defendant No.1 claims under the Will under which the deceased has bequeathed his entire property as there are no restrictions applicable in view of the marriage being registered under the Special Marriage Act, a probate is required as that is a necessity under the Indian Succession Act. It is submitted that no legal right can be granted in favour of Defendant No.1 to the estate of the deceased if the Will has not been probated.

8. Reliance is placed by the learned Advocate for the Plaintiffs on the judgments in the case of Mohan Lal vs. Mirza Abdul Gaffar, (1996) 1 SCC 639, S. Mudaliar vs. State of Madras, 1970 (1) SCC 4, Karnataka Board of Wakf vs. Government of India, (2004) 10 SCC 779 and Hem Nolini Judah vs. Isolyne Sarojbashini Bose, AIR 1962 SC 1471 in support of his submissions.

9. Defendant No.1 relies on the judgments in the case of Ahronee Shemail vs. Ahmed Omer, AIR 1931 BOMBAY 533 and Mahomed Hussein Haji Gulam Mahomed Ajam vs. Aishabai and others, AIR 1935 BOMBAY 84 in support of the submission that there is no statutory obligation on a Mahomedan executor to take a probate of a testator’s Will.

10. Undisputedly, the Nikah of Khatal Moosa Phaniband and Azambi was performed in 1926. The marriage was solemnized subsequently under the Special Marriage Act, 1954 as well. Section 18 of the Special Marriage Act, stipulates the effect of a marriage under that Act. Where a marriage is registered under the Special Marriages Act, it is deemed to be a marriage solemnized under the Act. Section 21 of the Special Marriage Act reads as under :-

> "21. Succession to property of parties married under the Act. - Notwithstanding any restrictions contained in the Indian Succession Act, 1925 (39 of 1925), with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this Act shall have effect as if Chapter III of Part V (Special Rules for Parsi section that intestate) had been omitted therefrom."

Therefore, this Section provides that succession to the property of a person whose marriage is solemnized under the Act would be regulated by the provisions of the Indian Succession Act, 1925. Had Khatal Moosa died intestate, his estate would have devolved on his heirs under the Indian Succession Act because his marriage was registered under the Special Marriage Act on 14th

September 1970.

11. Section 58 which is contained in Part VI of the Indian Succession Act, provides that that part would not apply to the testamentary disposition to the property of any Muhammadan. Section 213 provides that no right as an executor or legatee can be established by a person unless a Court of competent jurisdiction has granted probate of the Will of the deceased under which the right is claimed by the person or has granted letters of administration that the Will or an authenticated copy of the Will annexed. Sub-section (2) of this Section makes the section inapplicable to Wills made by Muhammadans.

12. The question, therefore, is whether Section 21 of the Special Marriage Act would have the effect of removing the restriction on a Muslim which permits him to bequeath only a part of his property. A question also arises as to whether a Will which is made by a Muslim married under the Special Marriage Act needs to be probated. Can such a Muslim avail of the enabling provision under Section 213(2) of the Indian Succession Act ?

13. In my view, prima facie, it appears that a Muslim who marries under the Special Marriage Act is entitled to bequeath his entire property. There would

be no restriction on him to bequeath only 1/3rd of his property as is provided under the Muslim Personal Law. Moreover, such a person would not have to obtain the consent of the heirs in order to bequeath in excess of the legal third of his property. However, once a Muslim who is married under the Special Marriage Act is treated on par with person of other communities married under the Special Marriage Act, all the rigours of the Indian Succession Act are applicable. Prima facie, it appears to me that a Will of such a Muslim who was married under the Special Marriage Act would require to be probated.

14. The judgment in the case of Mahomad Hussain (supra) relied on by Defendant No.1 would not be applicable as the question which arose in that case was regarding a Muslim who was married by performing a Nikah and not under the Special Marriage Act. In such circumstances, it was held that a Mahomedan executor can establish his right without taking probate. That, in any event, is the law under the Succession Act.

15. In the case of Hem Judah (supra), the Apex Court came to the conclusion that Section 213 creates a bar to the establishment of any right under the Will by any legatee or executor unless the probate or letters of administration of the Will have been obtained. This is so irrespective of whether such a right is claimed by

the person as a Plaintiff or a Defendant. There is no doubt that this judgment was not in respect of Muslims. However, in my view, prima facie, in the light of the deceased having married under the Special Marriage Act, Defendant No.1 would have to establish his right only after obtaining a probate of the Will of the deceased.

16. Defendant No.1 is in possession of the suit property ever since the death of the deceased on 16th May 1982. Defendant No.1 has been dealing with the property for twenty four years. In such circumstances, in my view, it would not be proper to appoint a Court Receiver when the Plaintiffs have approached the Court at this belated stage. The Plaintiffs have already been granted the relief as aforesaid at the ad-interim stage.

17. In my view, the order needs to be confirmed in order to protect the property.

18. Hence, the following order :-

(a) Defendant No.1 is restrained from transferring the suit property or creating any third party right in respect of the suit property without prior permission of this Court.

(b) Defendant No.1 has already filed the list of tenants as directed by the Order at the ad-interim stage. Defendant No.1 is restrained from transferring the tenancies or creating new tenancies or inducting new tenants without prior permission of this Court.

(c) Defendant No.1 shall keep accounts of the rent collected from the existing tenants and the payments made in respect of the Municipal taxes and other outgoings during the pendency of the present Suit.

(d) Defendant No.1 shall submit the accounts in this Court and furnish a copy of the same to the Plaintiffs and Defendant No.2, annually.

19. Notice of Motions disposed off accordingly.